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In The

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,

Petitioner,

– *vs.*

GEORGE R. STOWERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a locomotive engineer at a switchyard facility under the supervision of a railroad trainmaster and yardmaster that services two docking companies is engaged in "maritime employment" for purposes of the LHWCA when his duties vis-a-vis the docking companies consist solely of dropping off ("spotting") and picking up loaded or empty railroad freight cars which the docking company employees, under dock company supervision, load or unload?

2. Whether the "back track" of the Harbor Yard, where Respondent was injured, constitutes a "maritime situs" for purposes of the LHWCA, when the Harbor Yard does not satisfy the shipping industry's definition of "marine railway," and when the "back track" was not used for functions integral to the loading and unloading of maritime vessels, and contained no equipment used for loading or unloading the railroad freight cars, but was utilized only for the standard railroad functions of "bad order" set off and train classification?

3. Whether a railroad common carrier that operates a switchyard facility for the purpose of servicing two docking companies is a "maritime employer" under the LHWCA when, although one docking company is a corporate affiliate of the common carrier, the railroad operation and docking company are operated entirely separately, with separate employees, separate supervisors, and separate facilities, and when only the docking company employees, and not the railroad employees, service and operate all equipment integral to the loading and unloading of maritime vessels?

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RESPONDENT'S BRIEF IN OPPOSITION

RESPONDENT'S SUPPLEMENTAL STATEMENT OF FEDERAL STATUTES AT ISSUE

In addition to the statutory provisions cited by Petitioner, Respondent notes that, although this case does not involve construction of the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51, 56, Respondent, as an injured railroad worker, is entitled to bring his cause of action under those FELA provisions, which are set forth in Respondent's Appendix. Additionally, Respondent notes that Petitioner failed to set forth the following

relevant LHWCA provision, 33 U.S.C. § 903(a), which specifies what injuries the LHWCA intends to cover, and defines the maritime "situs" requirement:

> § 903. Coverage
>
> (a) Disability or death; injuries occurring upon navigable waters of United States
>
> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

STATEMENT OF THE CASE

A. Procedural Facts.

On May 24, 1991, Plaintiff-Respondent George Stowers filed the instant action in the United States District Court for the Northern District of Ohio against his employer, Defendant-Petitioner, Consolidated Rail Corporation (Conrail). The complaint sought damages, pursuant to the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60, for personal injuries sustained by Mr. Stowers in the course of his employment as a locomotive engineer of a switchyard crew at Conrail's Ashtabula Harbor Yard. Contrary to Petitioner's assertion (Petitioner's Brief, p. 5), Mr. Stowers was *not* an employee of the Conrail Coal Dock Company, which was a separately run operation from the Conrail

railroad operation. Rather, the Conrail railroad company operated the Harbor Yard facility as a typical industrial switchyard servicing two companies: the Conrail Coal Dock Company and the Penney Dock Company.

Mr. Stowers' complaint sought recovery solely under the FELA, and not under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901, *et seq.* Nevertheless, in its answer, and subsequent motion for summary judgment,[1] Conrail moved to dismiss Mr. Stowers' action on the ground that the District Court lacked subject matter jurisdiction over his FELA claim because his injury, which occurred when the locomotive he was operating in the Harbor Yard's "back track" ran over a derailing device, fell within the exclusive jurisdiction of the LHWCA.

Ruling that the Harbor Yard's "back track" constituted a "maritime situs" under 33 U.S.C. § 903(a), that the Conrail railroad operation was a "maritime employer" under 33 U.S.C. § 902(4), and that Mr. Stowers was engaged in "maritime employment" under 33 U.S.C. § 902(3), the District Court granted Petitioner's motion for summary judgment, and dismissed the complaint for lack of subject matter jurisdiction.

Mr. Stowers appealed the judgment to the United States Court of Appeals for the Sixth Circuit. On February 8, 1993, the Sixth Circuit reversed, and remanded the case for trial of Mr. Stowers' FELA claim. The majority found that the LHWCA did not apply because Mr. Stowers was not engaged in "maritime employment," as his duties in relation to the docking companies did not involve the loading and unloading of maritime vessels, but were merely the first or last stage in overland transportation. Noting that the limits

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1. Upon suggestion of the District Court, the parties filed Cross-Motions for Summary Judgment on the jurisdictional issue.

to which Conrail sought to force LHWCA coverage here far exceeded the boundaries of any prior holdings (all of which are distinguishable as involving loading and unloading activities, or maintenance or repair functions that facilitated those activities), the majority reasoned that

> [a]s the unique facts of each case are presented, *the line must be drawn somewhere. We find that common sense dictates that, on the facts of this case, it be drawn where one form of transportation ceases and the other begins.* The switchyard crew's duties were part of the first or last stage of the overland railroad shipment of cargo. The crew's duties were the same as they would have been at any other railroad switchyard servicing another type of industry in which railroad cars are loaded or unloaded by another trade, employer, or business entity. *Stowers did not participate in the loading or unloading of the ships, or even of the rail cars, and therefore he certainly was not engaged in an "essential or integral" part of the shiploading process. He hauled the rail cars to the docks for dock employees to load or unload, and he hauled them away when dock employees were finished loading or unloading.* The overland transportation began and ended with the work of Stowers and the switchyard crew.

985 F.2d at 297 (emphasis added). One judge dissented, finding that all requirements of the LHWCA were met. Although the majority did not reach the "situs" issue, the dissenting judge found the "back track" to be a "maritime situs" by construing the term "marine railway" to include all railroad switchyard facilities

located near water and servicing docking companies. 985 F.2d at 298.

On February 23, 1993, Petitioner filed a Petition for Rehearing and Request For En Banc Consideration. On April 6, 1993, both were denied. Thereafter, on May 11, 1993, the Petition For Writ of Certiorari was filed. Respondent respectfully submits that, as this case involves no true conflict with the cases Petitioner cites, and indeed is in accord with prior Supreme Court rulings as well as the statutory intent of the LHWCA, the Petition For Writ of Certiorari should be denied.

B. Facts Material To The Questions Presented.

Mr. Stowers' injury occurred on March 21, 1991 while he was performing his assigned duties as a locomotive engineer on the "back track" of the Ashtabula Harbor Yard. He was pulling a drag of 60-80 empty coal hopper cars, for the purpose of setting several "bad order" cars out for repairs,[2] so that the remaining cars could be made up for trains for transportation in interstate commerce.

Heading southbound on the "back track," Mr. Stowers ran over a "de-rail" device placed on the track by a Conrail track repair gang. The locomotive derailed off the track, throwing Mr. Stowers against the windshield and onto the floor, causing him to sustain serious and permanent injuries.

Mr. Stowers had been employed as an engineer or fireman by

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2. Although, at p. 8 of its Brief, Petitioner describes the bad order cars as "cars in need of repair as a result of damage inflicted by the mechanical dumper . . . ," *there is absolutely no evidence in the record as to what caused the damage to the bad order cars on this, or any other, occasion.* Petitioner may not speculate that they were damaged during the dumping process, when they could as easily have been damaged during the over-the-road operations, or while being moved within the Harbor Yard itself.

Conrail since 1950. For most of those years he was part of an over-the-road crew. In 1989, he transferred to Conrail's Ashtabula Harbor Yard.

The Ashtabula Harbor Yard is a switchyard facility jointly used by Conrail and Pittsburgh & Lake Erie Railroad. In function, it parallels Conrail's other industrial switchyard facilities that service Chrysler, Ford, and the Cleveland Electric Illuminating Company. At each of these facilities, the Conrail switchyard crew takes cars brought in by over-the-road transportation crews, drops them off (or, in railroad parlance, "spots" them) where the industry being serviced wants them, then transports empty, or newly-loaded, cars for further shipment through interstate commerce.

Two docking companies are serviced by the Ashtabula Harbor Yard: the Conrail Coal Dock Company and the Penney Dock Company. The Conrail Coal Dock Company receives coal brought in by the railroad from mining operations in West Virginia, Pennsylvania, and other points south. Upon receipt of the coal-filled cars, the Coal Dock workers, not the railroad workers, operate the mechanical dumping equipment used to unload the cars. This means that docking company employees alone, not the switchyard crew, operate the retarders that lock the coal cars into place in the dumper,[3] the mechanical devices which cause the

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3. Petitioner makes much ado about the Sixth Circuit's statement that "Stowers would lock the coal-filled cars into a mechanical dumper." However, apart from not being dispositive of the matter, this statement is not accurate. The testimony was that the switchyard crew backed the train of loaded cars into the dumper, the last of the string actually protruding within it, then cut the engine and pulled away. Then docking company employees, not the switchyard crew, actually "locked" the cars into the dumper. The statement that the switchyard crew "locked" the coal cars into the dumper may have originated from some confusing syntax in train master Englund's deposition testimony:

(Cont'd)

freight cars to overturn and which eject the unloaded cars from the dumper, and the conveyor belts through which the product is shuttled eventually onto Great Lakes ships. The Penney Dock Company, on the other hand, receives imported products — mostly iron ore and fertilizers — from maritime vessels coming in from the Great Lakes. Upon receipt, the Penney Dock transfers these products from the vessels onto railroad cars for further delivery through interstate commerce by railroad.

The Penney Dock Company has no common corporate heritage with Petitioner; and its facilities and operations are entirely separate from the railroading operation. Only the dock company workers unload the incoming products from the maritime vessels and onto the outbound freight cars. The switchyard crew merely drops off empties, and pulls them away after they have been loaded.

Likewise, although the Conrail Coal Dock Company is owned by Conrail, it functions separately from the railroading operation.

(Cont'd)

> Q. Well, mechanically, I'm not familiar with it, I've never seen it, but the car obviously has to be spotted in some way in relation to the dumper in order to be dumped. A. Yes. *The yard crew pushes it up into the dumper and they grab it with a set of retarders and hold it for a mechanical arm.*
>
> Q. Then *all of that equipment is operated by coal dock people*, correct? A. *Yes, sir.*

(Englund Depo., App. 14a). The confusion inheres in the use of the word "they" in the first quoted answer. While, at first glance, this pronoun seems to refer to the yard crew, when read in conjunction with the second quoted answer, as well as the testimony of Mr. Stowers, it must be understood to refer, rather, to the docking company employees. (Stowers' Aff., App. 6a-10a; Englund Depo., App. 12a-14a.)

The delivery services provided by the railroad to the Coal Dock Company are provided by virtue of a contract. The Coal Dock Company has its own management and supervision separate and distinct from the supervision of the Harbor Yard. *The Coal Dock Company employees perform all the loading and unloading operations, as well as all the maintenance and repair of the loading and unloading equipment.* The Coal Dock facilities, themselves, are separate and distinct from the Harbor Yard. The switchyard crew's function at the Coal Dock facilities is merely to drop off, *i.e.*, "spot," cars where the Coal Dock needs them, *i.e.*, at the dumper, and, afterwards, to pull them away. Mr. Stowers testified that spotting them at the dumper involved backing the last car of the train into the dumper, cutting off the engine, and driving away.

The yard switching crew to which Mr. Stowers belonged consisted of himself as locomotive engineer, one conductor, and one brakeman. The job assignment is designated as "YIAS-11." This is a regular yard switching job of Conrail within its Pittsburgh division. The job is obtained in accordance with Conrail bidding seniority procedures through the Conrail crew dispatcher's office in Pittsburgh.

In addition to spotting and picking up cars from the docking facilities, the YIAS-11 crew performs other typical railroad functions. It may be sent by the yard master to other Conrail facilities, such as the West Yard or the CEICO facility which services the Ashtabula branch of the Cleveland Electric Illuminating Company. The YIAS-11 crew also crosses public gradings and switches in accordance with federal regulations. Other operations within the Harbor Yard include train classification for interstate commerce.

Operations within the Harbor Yard are under the exclusive supervision of Conrail through its train master and yard master.

The train master oversees the operation and supervises railroad crews; his jurisdiction encompasses territories beyond the Harbor Yard, including supervision of over-the-road crews. The yard master is responsible for the entire operation at the Harbor Yard, including the making up of trains, directing the spotting and pulling away of cars, kicking out "bad orders," and making sure that trains are inspected by car inspectors. Neither the train master, the yardmaster, nor any of the railroad's other supervisors supervise any of the docking companies' employees; nor are the railroad employees supervised by docking company supervisors. Although Conrail claims that railroad employees could be "supervised" by docking company employees, it is apparent that this means no more than that the docking company, as a customer, may indicate to the switchyard crew where it needs the railroad cars spotted. It is absolutely undisputed that the railroad crew never operated the machinery used to load or unload products from the freight cars.[4]

The "back track," where Mr. Stowers was injured, is a lead track in the Harbor Yard, used for train classification and bad order setoff as part of the railroad's operation. It is entirely supervised by railroad personnel; it is not within the dock companies' facilities; and dock company employees have no occasion to use it.

Finally, there was no evidence that any of the railroad tracks at the Harbor Yard were the sort of paired railroad tracks that descend below the water level and are used as an alternative to dry docks to

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4. Petitioner's argument that Mr. Stowers "operated" loading/unloading equipment because he hauled the freight cars which were subsequently unloaded by the docking company does not figure into the foregoing statement, as that argument does not represent a fact, but, at best, represents an attempt to redefine the term "operate" beyond its common-sense, customary meaning of operating the actual equipment (mechanical arms, conveyors, etc.), used to dump cars and shuttle coal onto maritime vessels.

pull maritime vessels out of the water. In other words, there was no evidence that the Harbor Yard is what the drafters of the LHWCA intended when, in 33 U.S.C. § 903(a), they defined maritime situs as including a "marine railway."

C. Statement of Additional Inaccuracies And Omissions Contained In Petitioner's Brief.

Throughout its statement of facts and argument of the law, Petitioner repeatedly mischaracterizes the facts in a way that it had not done before the Sixth Circuit and the District Court. The issue in this case has always been *whether the switchyard crew's delivery function will be deemed "maritime employment" despite the fact that the switchyard crew did not manually, or throuqh operation of mechanical equipment, load or unload the railroad cars or perform any related function, such as maintenance or repair of equipment integral to the loading and unloading processes.* Nevertheless, Petitioner's statement of facts now contains numerous mischaracterizations that falsely seek to create the impression that the switchyard crew itself assisted in the process of transferring cargo from rail cars to maritime vessels, and vice versa.

These misstatements include that, "Coal dock workers and the Harbor Yard workers load coal onto the ships" (Petitioner's Brief, p. 7); that "yard engineers . . . are directly involved in the loading of coal onto ships" (Petitioner's Brief, p. 9); and that, after the road crews drop the cars off at the Harbor Yard, the "'[s]witchyard crews' then begin the assembly of cars for unloading into ships at the dock." (Petitioner's Brief, p. 7.)

What is particularly disingenuous about these statements is that they enable Conrail inaccurately to argue that this case is on point with other cases where railroad workers were covered by the LHWCA, when, in those cases, the railroad crews actually maneuvered the freight cars onto maritime vessels. *See, e.g,*

Pennsylvania Railroad Co. v. O'Rourke, 344 U.S. 334 (1952); *Conligio v. Norfolk & Western Ry. Co.*, 670 F. Supp. 1353 (E.D. Mich. 1987); *Richards v. Norfolk & Western Ry. Co., unreported*, No. 86-CV-74028-DT (E.D. Mich. 10/30/87); *Sixbey v. Norfolk & Western Ry. Co., unreported*, C.A. No. 87-CV-60145-AA (E.D. Mich. 4/4/88); and *Patterson v. CSX Transportation, Inc., unreported*, Case No. 921044 (Va. S .Ct. 4/16/93).

Here, by contrast, Respondent's switchyard crew performed no similar function directly or integrally concerned with the loading and unloading of ships; *they never loaded railroad cars or cargo onto maritime vessels;* they simply spotted empty or full cars at the docking company's facility, and pulled them away after docking company employees had loaded or unloaded them.

Other vivid mischaracterizations by Petitioner include its reality-distorting argument that the hauling of freight cars, which are subsequently overturned by docking company employees during the unloading process, itself constitutes the "operation" of equipment essential or integral to the loading and unloading process; and the statement that the switchyard crew "spot[s], assemble[s] and move[s] cars into... the dumper," (Petitioner's Brief, p. 7), making it sound as if "spotting" is the first, rather than the last, stage in the process of delivering the coal cars to the custody of docking company employees.

The numerous mischaracterizations of the Sixth Circuit's majority opinion will be dealt with in the ensuing portions of this brief.

REASONS FOR DENYING THE WRIT

I.

SUMMARY OF ARGUMENT

There is no inconsistency between the Sixth Circuit's ruling and the cases cited by Petitioner. *Respondent's duties at the docking company situs were solely a delivery function having nothing to do with loading and unloading;* the switchyard crew merely delivered full or empty freight cars and returned to pick them up after they had been loaded or unloaded by dock company workers.

The Sixth Circuit's conclusion that this did not constitute "maritime employment" is fully consonant with the congressional intent to exclude from coverage persons present at a maritime situs solely to drop off or pick up cargo. This is the reason it is significant that the switchyard crew's duties at the Harbor Yard were the same as they would be at any other switchyard. Although their interaction with the recipient of the cargo is necessitated by the act of delivering goods, the switchyard crew *remained affiliated with the land-based transportational system because they did not get involved in the loading and unloading process.* Their function was the first or last stage in the movement of cargo through the land-based stream of commerce before or after its delivery to, or receipt from, the stream of maritime commerce.

It will further be noted that Mr. Stowers was not injured on a "maritime situs", for purposes of 33 U.S.C. § 903(a), as the "back track" was never used for docking company operations, and the Harbor Yard is not a "marine railway" as that term is understood in the shipping industry. Likewise, the Conrail railroad operation by whom Mr. Stowers was employed is not a "maritime employer" for purposes of 33 U.S.C. § 902(4).

II.

THE SIXTH CIRCUIT'S HOLDING COMPORTS WITH THE LHWCA'S STATUTORY INTENT TO EXEMPT FROM COVERAGE WORKERS, SUCH AS RESPONDENT, WHOSE "RESPONSIBILITY ON THE WATERFRONT IS ESSENTIALLY TO PICK UP OR DELIVER CARGO UNLOADED FROM OR DESTINED FOR MARITIME TRANSPORTATION." *NORTHEAST MARINE TERMINAL CO., INC. V. CAPUTO,* 432 U.S. 249 (1977).

The Congressional History of the 1972 amendment to the LHWCA, and the case law interpreting it, clearly reveal that Congress never intended LHWCA coverage to apply to switchyard engineers such as Mr. Stowers whose sole function at the dock is to drop off or pull away freight cars which the maritime workers employed by the docking company are responsible to load and unload.

Although, in the statute itself, Congress did not expressly define the term "maritime employment,"[5] the legislative history indicates that persons acting as delivery agents from the land-based transportational system were never intended to be covered:

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by the Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded

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5. The statute defines an "*employee*" as a "*person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations,* and any harbor worker including a ship repairman, shipbuilder, and shipbreaker. . . ." 33 U.S.C. § 902(3).

> from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters or on the adjoining land area. *The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered.*

S. Rep. 13, H.R. Rep. 10-11, U.S. Code Cong. & Admin. News 1972, p. 4708 (emphasis added). (App. 3a-5a).

The judicial interpretation of this history remains faithful to the distinction between delivery functions and functions involving loading and unloading.

Thus, in the seminal case of *Northeast Marine Terminal Co.. Inc. v. Caputo,* 432 U.S. 249 (1977), the Court, interpreting the above-quoted passage, concluded that

> . . . [t]he example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, *employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.*

Id., at 267 (emphasis added).

This distinction was again recognized in *P.C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69 (1979). In *Pfeiffer,* one of the workers was injured while fastening military vehicles onto railroad flatcars; the other was injured while unloading cotton from a draywagon into a pier warehouse for later loading onto maritime vessels. While finding that these workers were covered by the LHWCA, as their duties were typical longshoreman tasks of loading and unloading cargo, the Court reiterated that there is a critical distinction between loading/unloading and delivery functions:

> There is no doubt for example, that *neither the driver of the truck* carrying cotton to Galveston *nor the locomotive engineer transporting military vehicles from Beaumont was engaged in maritime employment even though he was working on the marine situs. Such a person's 'responsibility is only to pick up stored cargo for further trans-shipment.'*

Id., at 83 (emphasis added).

In the instant case, the function of the switchyard crew was essentially the same as that of the truck drivers or the locomotive engineer mentioned in *Pfeiffer* and *Caputo.* In each instance, the transportation workers are merely engaged in picking up or delivering cargo as part of the process of overland transportation. As such, Congress expressly did not intend for them to be covered by the LHWCA.

III.

THE SIXTH CIRCUIT'S HOLDING IS NOT INCONSISTENT WITH CASES WHICH FIND RAILROAD WORKERS TO BE COVERED BY THE LHWCA WHEN THE TASKS THEY PERFORM ARE DIRECTLY AND INTEGRALLY RELATED TO THE LOADING AND UNLOADING OF MARITIME VESSELS.

Cases cited in Petitioner's Brief as being inconsistent with the Sixth Circuit's holding are inapposite as involving either direct loading by railroad workers of freight cars onto maritime vessels, or the repair and maintenance of structures and equipment integral to the loading/unloading process.

The three cases which Petitioner reproduces in its Appendix (App. A38-A68) fall into the "direct loading" category. Thus, in *Patterson*, a railroad switch operator was deemed a "maritime employee" when he was injured while uncoupling cars for direct loading onto a barge where a member of his crew was waiting *on the barge* to receive them. Likewise, in *Sixbey*, a railroad conductor was found to be engaged in "maritime employment" when he "was injured while engaged in the process of moving cars *onto a barge* for shipment across the Detroit River." (App. A47). Again, in *Richards*, the injured plaintiff "was operating a locomotive on dry land, moving railroad cars directly *onto a barge* for delivery in Windsor." (App. A52).

Indeed, it should be noted that, even before the 1972 amendment, these "direct loading" employees were covered by the LHWCA when their injuries occurred during the portion of the loading/unloading process while they were on or over navigable waters. *See, e.g., Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334 (1953). The 1972 amendment expanded this coverage to include the shoreward aspect of the direct loading process when it was indeed a continual loading/unloading process by the railroad

crews. As noted previously, this is simply not the scenario in the case *sub judice,* as the railroad crew merely spotted the loaded/unloaded cars at the docking company facilities for the docking company workers, alone, to load or unload. In short, the direct loading cases are completely inapposite to this case.

Likewise, the other railroad worker cases cited by Petitioner are critically dissimilar from the facts here. In this respect, there is no merit to Petitioner's contention that the Sixth Circuit refused to follow the Supreme Court's holding in *Chesapeake & Ohio Railway Co. v. Schwalb,* 493 U.S. 40 (1989).

Granted, in *Schwalb,* the injured workers were employees of railroad companies, and the facilities they serviced were coal dock operations, but the factual similarities between the consolidated cases in *Schwalb* and the case *sub judice* ends there. In *Schwalb,* the workers' duties included the repair or maintenance of equipment *used in the loading and unloading process.* Two of the injured workers cleaned spilled coal from the trunion rollers which activated the mechanical dumper and from underneath the conveyor belts used to shuttle coal from the dumper to its maritime destination. The pier machinist in the companion case of *Norfolk & Western Railway Co. v. Goode,* 493 U.S. 40 (1989) maintained and repaired the dumpers and conveyor belts, and was injured while repairing a retarder on the dumper.

There is no question that the equipment these workers serviced was integral to the loading/unloading process; and that, had they been injured while *operating* this equipment, they would have been covered as workers whose duties modern technologies moved inland. *See, Caputo.* Nevertheless, as these workers were not engaged in the actual loading/unloading process, the appellate courts prior to *Schwalb,*[6] and the Supreme Court in *Schwalb,*

6. As noted in Justice Stevens' concurrence in *Schwalb,* prior to *Schwalb,* "the Federal Courts of Appeals . . . consistently interpreted the Act's status requirement to encompass repair and maintenance workers." 493 U.S. at 51.

needed an analytic tool to conceptualize the relation of these workers to the overall loading/unloading process, to determine whether they were workers Congress intended to cover. Hence, the "but for" language used in *Schwalb* to describe how their function was integrally related to the loading/unloading process; hence, in *Schwalb*, and its precursors, the continual admonishment to liberal construction to achieve the statute's broad remedial intent.[7]

What *Schwalb* and the other repair and maintenance cases stand for, then, is the proposition that *repair and maintenance of equipment used to load and unload maritime vessels is tantamount to operation of that equipment for purposes of the LHWCA's definition of "maritime employment."* These are classes of limbo workers whom Congress intended to benefit by extending coverage inland; these are workers who are justly described as subordinates to the maritime transportation system. *Delivery persons from the land-based transportational system such as the switchyard crew, sub judice, on the other hand, simply do not fall within the factual parameters of Schwalb and the other repair and maintenance cases.* As noted in *Schwalb*, the test of LHWCA coverage is always, "an occupational test focusing on loading and unloading." As noted in *Pfeiffer* and *Caputo*, delivery functions

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7. Liberal construction, however, cannot be equated with fanatical application of rules to circumstances to which, realistically, they do not pertain. A rule of liberal construction serves as a tie-breaker for those nebulous functions that are not quite longshoring, but are subsidiary to it, such as repairing and maintaining equipment essential to the loading/unloading process. The delivery service performed by agents of the land-based transportational system, however, is not such a nebulous function. In amending the LHWCA, Congress "did not see itself as including under the Act whole new groups and classes of employees." *Stockman v. John T. Clark & Son of Boston Inc.*, 539 F.2d 264, 276 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977). Thus, as noted in *Schwalb*, although "the 1972 amendments were to be liberally construed... [to] cover[] all those on the situs involved in the essential or integral elements of the loading or unloading process...[,] *those on the situs not performing such tasks are not covered.*" *Id.*, at 46.

performed by emissaries of the land-based transportational system are not a part of the loading and unloading process. As noted in *Sea-Land Service, Inc. v. Dir. Office of Workers' Compensation Programs, etc.*, 540 F.2d 629 (3rd Cir. 1976),

> *The line which Congress intended to draw was between maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes from an employer engaged in the former to an employer engaged in the latter.* That the one employer may be engaged in both types of commerce is irrelevant. The line should still be drawn where cargo is delivered to a segregated place for delivery to the next mode of transportation.

Id., 540 F.2d at 639 (emphasis added).[8]

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8. Contrary to Petitioner's argument, this distinction does not revive the defunct point-of-rest doctrine. That doctrine was concerned, not with the functional significance of the worker's duties, but with the artificial test of the point at which cargo first came to rest before or after its contact with the maritime vessel. Here, on the other hand, the distinction analyzes job duties in relation to which system of transportation the injured worker services — an analysis which clearly implements the congressional intention of covering only those workers engaged in "maritime employment."

IV.

THE SWITCHYARD CREW'S FUNCTION OF "SPOTTING" FULL FREIGHT CARS AT THE DUMPER, AND PULLING AWAY EMPTIES AFTER THE DOCKING COMPANY EMPLOYEES HAVE UNLOADED THEM, CANNOT SOUNDLY BE CHARACTERIZED AS THE "OPERATION" OF EQUIPMENT ESSENTIAL TO THE LOADING AND UNLOADING PROCESS.

There is further no merit to Petitioner's claim that the switchyard crew's delivery function is in reality a loading and unloading function simply because the coal cars themselves are subsequently overturned (by coal dock company employees) in the unloading process that takes place in the dumphouse.

The "delivery" vs. "loading/unloading" distinction cannot be avoided through such absurd manipulation of terms. The fact remains that this switchyard crew does not operate (or repair or maintain) the mechanical equipment used to overturn coal cars in the dumper; it does not operate (or repair or maintain) the conveyors that shuttle the coal to storage for later conveyance to maritime vessels. The switchyard crew merely drops off and picks up the full or empty freight cars brought in by its over-the-road crews. Conrail itself has organized its operations such that the switchyard crew and the over-the-road crews are part of the same land-based transportational system, whose orders emanate from the yard master and train master out of the railroad facility. Conrail for its corporate purposes set up a separate corporate entity to run the docking operation, with separate facilities, separate supervisors, and separate employees, who handle all aspects of the loading/unloading operation, including repair and maintenance of that equipment. It is therefore ironic (if not disingenuous) for Conrail to now be contending that its railroad operation is

"intertwined" in function with its coal dock company.[9] In point of fact, it set up those operations to function as *distinct entities who interact by contract* as they would with any other independent business entity — as they do with the Penney Dock Company, or with Chrysler, Ford, or the Cleveland Electric Illuminating Company.

That railroad freight cars are overturned in the dumping process while they are being unloaded by docking company employees does not make those cars "equipment" used to load or unload maritime vessels. Railroad freight cars *being hauled and delivered by switchyard or* over-the-road crews are merely cargo holders being borne through the land-based stream of commerce.

Indeed, Petitioner's characterization of the facts directly contravenes the *Pfeiffer* and *Caputo* examples quoted earlier. Consistent application of Petitioner's logic would require the conclusion that the locomotive engineer hauling freight out of the maritime situs in *Pfeiffer,* or the truck drivers picking up cargo at the maritime situses in *Pfeiffer* and *Caputo,* were all engaged in the "operation" of equipment essential to the loading/unloading of maritime vessels. In each of those instances, the vehicle that

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9. Likewise, Conrail's harping on the need for liberal construction in favor of the "thousands of railroad workers at marine railway facilities . . . [who] will be denied coverage" under the Sixth Circuit's ruling, must be viewed with a skeptical eye. *The only party who stands to suffer (thouqh not unfairly) from the Sixth Circuit's ruling is Conrail who perceived in Schwalb and similar cases a possible loophole for avoiding its FELA liability to railroad workers such as Mr. Stowers!* Furthermore, these are *not* railroad workers at a "marine railway" facility. *See* discussion of "marine railway" *infra,* pp. 26-27.

Conversely, the failure to affirm the Sixth Circuit's ruling would indeed effect an unjust deprivation of the rights of Mr. Stowers, and similarly-situated railroad workers, who, without engaging in the loading and unloading process, would *lose their rightful FELA coverage intended for them by Congress* to a system of workers' compensation coverage intended for longshoremen.

reentered the land-based transportational system had been entered or otherwise utilized by LHWCA-covered workers during the loading/unloading process. But clearly, under *Pfeiffer, Caputo,* and the congressional history itself, *coverage of the delivery workers under the LHWCA was not intended, regardless of what happens to the vehicle or its contents while it is in the possession of the maritime workers.*

Again, the focus must be on the function of the injured worker vis-a-vis the loading/unloading operation. Just as the worker who fastens a military vehicle onto a flatbed car is a "maritime employee," while the locomotive engineer who hauls that same train out of the maritime situs is not, *see Pfeiffer*; so, too, the coal dock employees who overturn the coal cars in the mechanical dumper are "maritime employees," while the switchyard crew that "spots" those cars at the dumper, then subsequently hauls them away, are not "maritime employees."

V.

THE SIXTH CIRCUIT DID NOT ERR IN RELYING ON *CONTI V. NORFOLK & WESTERN RAILWAY CO.*, 566 F.2D 890 (4TH CIR. 1977).

Petitioner's description of the Sixth Circuit's majority opinion, especially with respect to its reliance on *Conti v. Norfolk & Western Railway Co.*, 566 F.2d 890 (4th Cir. 1977), does not provide a fair statement of the reasons the Sixth Circuit ruled as it did.

Both *Conti* and the case *sub judice* involve railroad workers employed in a harbor yard servicing a coal dock facility. The workers in *Conti* were two brakemen and one brakeman-conductor. As here, in *Conti,* the railroad workers neither had occasion to go aboard the pier or maritime vessels, nor to operate (or repair or maintain) the equipment used in the loading/

unloading process. As here, the railroad workers in *Conti* were sometimes assigned duties outside the harbor yard, and were always "governed by the same operating and safety rules as other brakemen, conductors and engineers." *Conti*, 566 F.2d at 892. Under these circumstances, the Court in *Conti*, and the Sixth Circuit below, found that the railroad workers were not engaged in "maritime employment" as they,

> (1) were "not engaged in an 'integral part of the unloading process'"; and
>
> (2) performed tasks of a "traditional railroad" nature rather than of a "traditional maritime" nature.

Conti, 566 F.2d at 895; *Stowers*, 985 F.2d at 296.

It is also true that the Sixth Circuit, relying on *Conti*, found a "meaningful distinction" between "the unloading of a coal train, [and] loading [of] a vessel," *Id.*, at 296, but this finding must be understood in context. The Sixth Circuit did not deny that if the switchyard crew's function had involved loading/unloading tasks such as operating the mechanical dumper equipment or pushing freight cars onto maritime vessels, that function would have been "maritime employment." But that is not what the switchyard crew's duties involved. Rather, the Sixth Circuit expressly noted,

> *it is significant here that Stowers did not participate in the loading or unloading of the rail cars; he merely delivered the cars to the loading and unloading site, and later hauled them away.*

Id., at 296. (emphasis added.)

Thus, the "meaningful distinction" that the Sixth Circuit

found is the very same distinction recognized in *Pfeiffer* and *Caputo*: that between a delivery function emanating from the land-based transportational system and a loading/unloading function servicing the maritime system.

That this is the proper reading of *Conti*, and of the Sixth Circuit's opinion, is confirmed by the recent holding in *Hayes v. CSX Transportation, Inc.*, 985 F.2d 137 (4th Cir. 1993). In *Hayes*, while the Fourth Circuit found that a railroad worker who was injured at the maritime situs while assisting crane operators in unloading a ship's cargo to railroad cars was engaged in "maritime employment," the court reaffirmed its holding in *Conti* and distinguished *Conti* on its facts:

> As we explained in *Vogelsang v. Western Maryland Railway Co.*, 670 F.2d 1347, 1348 (4th Cir. 1982), the employees in *Conti* were not engaged in an integral part of the loading or unloading process. *They were engaged in moving the train.* Hayes, however, was engaged in employment of a traditionally maritime nature because his duties in directing the crane and fastening the cargo were an integral part of the ship unloading process. *Therefore, Conti is not applicable to the facts presently in this appeal.*

Id., at 142-143 (emphasis added). Indeed, virtually every case that has cited *Conti*, including *Harmon v. Baltimore & Ohio Railroad*, 741 F.2d 1398 (D.C. Cir. 1984) which Petitioner and the dissenting judge below have cited as directly conflicting with the instant case, have distinguished *Conti* on its facts. Thus, in *Harmon*, the court stated:

> The court [in *Conti*] held the railroad brakemen who worked in a shipyard were not covered by

> LHWCA because the employment was identical to that of railroad brakemen everywhere... In the instant case, because Harmon worked on equipment that was an integral part of loading and unloading operations, his job had a significant relationship to traditional maritime activities. In that sense, Harmon was engaged in the type of duties that longshoremen perform in transferring goods between ships and land transportation. *Thus Conti is inapposite.*

Harmon, 741 F.2d at 1404, (emphasis added). *See also, Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059, 1062 (4th Cir. 1980); *Vogelsang, supra; and Richards, supra.*

Thus, far from being in conflict with the analytic framework of *Caputo, Pfeiffer, Schwalb,* or any of the Circuit opinions following those cases, the Sixth Circuit's holding below, and the holding in *Conti,* recognize a valid distinction between delivery and loading/unloading functions, a distinction thus far recognized by this Court.

VI.

THE BACK TRACK WHERE RESPONDENT WAS INJURED IS NOT A "MARITIME SITUS"; AND THE HARBOR YARD IS NOT A "MARINE RAILWAY."

Although the Sixth Circuit reversed the District Court's holding based solely on the majority's finding that Respondent was not a "maritime employee," Respondent further asserts that he was not injured on a "maritime situs," and his employer was not a "maritime employer" for purposes of the LHWCA.

The LHWCA's "situs" requirement is met if the injury occurs

> upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, *marine railway,* or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.)

33 U.S.C. § 903(a) (emphasis added).

In the case *sub judice,* Petitioner contends, and the dissenting judge erroneously agreed, that Mr. Stowers' injury at the Harbor Yard's "back track" satisfies the "situs" requirement because the Harbor Yard constitutes a "marine railway." 985 F.2d at 298. This finding, however, does not accord with the definition of "marine railway" as understood in the industry, or as described in LHWCA cases addressing that term.

It is well-settled that a "marine railway" is a dry dock used for hauling maritime vessels out of the water in order to repair them.

> Technically, a dry dock is a watertight basin which after pumping out allows examination and work upon the bottom of a vessel. A graving dock, except for details of construction, is the same. A floating dock receives a vessel when the dock is submerged, after which the watertight compartments of the dock are pumped out and the buoyancy of the dock raises the vessel. *A marine railway is an inclined structure at the water's edge which extends below the water. It carries a cradle which moves on rollers or wheels. The cradle runs below the water and receives the vessel which is then hauled out.* Bradford, Glossary.of Sea Terms, "Dry Dock," "Railway."

Maryland Casualty Co. v. Lawson, 101 F.2d 732, 733 (5th Cir. 1939) (emphasis added). Thus,

> [i]n nautical parlance 'dry dock' 'floating dock' and 'marine railway' are interchangeable terms. Necessarily, all are located on navigable waters and used for exactly the same purposes, i.e., to raise a ship out of the water to permit examination and repairs to her hull which are impossible while she is afloat.

Id.; accord, Avondale Marine Ways v. Henderson, 346 U.S. 366, 367 (1952), Douglas, J., *concurring; St. Louis Shipbuilding v. Dir. of Office of Workers' Comp., etc.,* 551 F.2d 1119, 1122-1123 (8th Cir. 1977); *Union Shipbuilding Co. v. Boston Iron & Metal Co.,* 17 F. Supp. 318, 319 (D. Md. 1936).

Here, there is no question that the Harbor Yard is *not* a "marine railway" as that term is understood in the shipping industry. The Harbor Yard was merely a switchyard facility servicing two docking companies. There is no evidence (or even any allegation) that the Harbor Yard had tracks running into the water to pull out maritime vessels for repair. "Marine railways" have nothing to do with this case.

The "back track" area of the Harbor Yard, moreover, does not otherwise satisfy the definition of "maritime situs" for purposes of the LHWCA, as it was not "an area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a). Indeed there is not a shred of evidence in the record (or contention by Petitioner) that any equipment used to load or unload maritime vessels was housed or repaired anywhere on the premises of the Harbor Yard.

The "back track" was an area of the Harbor Yard farthest from the harbor. It was never used by the dock company employees for any purpose. It was used solely by railroad employees for the standard railroad functions of train classification and bad-order set off.

Contrary to Petitioner's contention, the functions of train classification and bad order set off are not part of the overall loading and unloading process, but are solely related to overland transportation. The switchyard crew's duties here were materially different from the duties of the railroad crews in *Patterson, Sixbey, Richards,* and *Conligio,* where the railroad crews were engaged in loading freight cars directly onto barges. In those cases, the railroad crews' activities on dry land, such as coupling of cars for subsequent loading onto vessels, were deemed to occur on maritime situses, even if those situses were not directly adjacent to the shore, because the functions performed there were part of a *continuous process,* in which the railroad workers were directly involved, of loading freight cars onto maritime vessels. Here, on the other hand, none of the freight cars "spotted" by Respondent and his crew were loaded by anyone onto maritime vessels.

VII.

THE RAILROAD COMMON CARRIER (CONRAIL) BY WHOM RESPONDENT WAS EMPLOYED WAS NOT AN "EMPLOYER" FOR PURPOSES OF THE LHWCA.

Finally, an employee is not covered by the LHWCA if his employer does not meet the definition of "employer" as set forth in 33 U.S.C. § 902(4). Here, the railroad common carrier for whom Mr. Stowers worked does not meet that definition.

Under 33 U.S.C. § 902(4), an "employer" must have one or more employees who possess "maritime status" and are employed, in whole or part, at a "maritime situs." 33 U.S.C. §§ 902(4), 904.

Here, the railroad common carrier (Conrail) does not satisfy this definition, as *none of the railroad employees had "maritime status."* As noted earlier, Conrail had formally arranged to keep its railroading and docking company corporate operations separate. The docking company was a separate legal entity, with separate employees, separate supervisors, separate facilities, and a separate purpose. The docking company performed all the loading and unloading operations, as well as all the maintenance of equipment used in those operations. The railroad workers, on the other hand, performed solely the delivery function of dropping off and picking up full or empty railroad cars at the docking company's facilities. As such, the railroad common carrier by whom Mr. Stowers was employed had no employees who engaged in "maritime employment," and Petitioner was not an "employer" for purposes of the LHWCA.

CONCLUSION

Respondent respectfully contends that the evidence adduced does not establish Petitioner's entitlement to summary judgment on the issue of subject matter jurisdiction. The Sixth Circuit below correctly held that the District Court erred in granting Summary Judgment. Respondent's Complaint and evidence was more than sufficient to meet his burden of establishing a prima facie FELA claim for relief within the subject matter jurisdiction of the District Court. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). For Petitioner to prevail, the evidence must establish as a matter of law all three elements necessary to classify Respondent as covered by the LHWCA rather than the FELA. These elements are: (1) "maritime employment"; (2) maritime situs; and (3) a "maritime employer." In fact, the evidence submitted establishes a total want of *any* of these elements. The Sixth Circuit correctly remanded this case for trial on the merits. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — 45 U.S.C. §§ 51, 56

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Appendix A

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

APPENDIX B — EXCERPTS FROM THE CONGRESSIONAL HISTORY OF THE 1972 AMENDMENT TO THE LHWCA, U.S. CODE CONG. & ADMIN. NEWS 1972, PP. 4707-4708

EXTENSION OF COVERAGE TO SHORESIDE AREAS

The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workman's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. The following are the maximum limits on the compensation payable for permanent total disability in some maritime States:

California	$70.00
Florida	56.00
Hawaii	112.50
Louisiana	49.00
Maryland	85.68
Massachusetts	[1]77.00
New Jersey	101.00
New York	80.00

1. Plus $6 for each dependent.

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Oregon	62.50
Pennsylvania	60.00
Texas	49.00

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victims of an injury.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the committee is to permit a uniform compensation system to apply to employees who would otherwise

be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

APPENDIX C — EXCERPTS FROM THE AFFIDAVIT OF GEORGE R. STOWERS

IN RE: GEORGE R. STOWERS

STATEMENT UNDER
OATH OF GEORGE R. STOWERS
TAKEN AT THE OFFICES OF
NURENBERG, PLEVIN, HELLER
& McCARTHY FIRST FLOOR, STANDARD BUILDING
CLEVELAND OHIO, ON TUESDAY
DECEMBER 24, 1991
AT 1:30 P.M.

QUESTIONS BY: MARSHALL I. NURENBERG, ESQ.
NURENBERG, PLEVIN, HELLER
& McCARTHY
FIRST FLOOR, STANDARD BUILDING
CLEVELAND, OHIO 44113

ANSWERS BY: GEORGE R. STOWERS

REPORTED BY: ANETA I. FINE, RPR

MEHLER & HAGESTROM
Court Reporters
1750 Midland Building
Cleveland, Ohio 44115
216-621-4984
FAX 621-0050
800 822-0650

* * *

[12] Q. Now, the kind of cars that you bring in to the coal dock, are they what would be called coal hopper cars? A. Yes.

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Q. And was there a track at the coal dock which might be called a dumper track? Maybe they use a different name for it? A. Yes. Where you put it into the machine I would say would be the dumper track.

Q. Now, when you bring cars in to the dumper track, do you spot the lead car so that it's by the dumper ready to be dumped? A. Well, if we're shoving a train down to the dumper it would be the rear car.

Q. All right. The hind car? A. The hind car.

Q. Then what do you do with your engine? A. Then we cut off and go to another track. Sometimes we push 40, 50 cars down to there and stop.

Q. All right. How do the cars then get moved along the dumper track so that each car can be dumped for loading purposes? [13] A. They're done with probably a mule or a machine, I imagine, pulls.

Q. But is there separate equipment operated by the coal dock and employees of the coal dock? A. Yes. They take care of the dumping.

Q. Once you bring a string of cars — let me put it a different way. When the road crews bring the cars in, where do they leave the cars, in what area? A. Usually in the bridge area.

Q. Then do you take an engine and go to the bridge yard and pick up the loaded cars? A. Yes.

Q. You then transport the loaded cars to the track where they are to be dumped? A. Yes.

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Q. At that point is your work done and it's up to the coal dock people to move the cars and dump them and get them into the ships? A. Yes.

Q. Do the crew of the switching operation like YIAS 11, do they have anything to do with the equipment that is used to dump the cars? A. No. Outside of the cars, pushing the cars.

Q. Yes. Once you spotted the cars is that the end [14] of your work? A. Yes. We're done. We're done.

Q. Would it be a fair description of your work as far as the coal dock operation is concerned, that you pick up loaded cars that are brought in by a road crew, bring them down to the coal dock, and then pick up empty cars and take them back to a place where the road crew can pick them up? A. Yes.

Q. Is the job then of your crew one of transportation of loads to the coal dock and empties from the coal dock to where they can be picked up? A. Yes.

Q. Are you directly concerned in your job with either the loading or unloading of ships as distinguished from transporting cars to be loaded or unloaded? A. I don't —

Q. All right. To get the cars loaded, I mean, sorry, to get the ships loaded? A. Yes.

Q. The cars have to be moved along the track, dumped by special equipment, and then in some [15] way through a series I guess of conveyors loaded onto the ship. Is that basically correct? A. Yes.

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Q. Do you people have anything to do with that kind of work at all? A. We just spot the car and put it up.

Q. That's what I'm saying. A. We don't have nothing to do —

Q. You don't work the mechanical arm that moves the cars along the track? A. No.

Q. You don't dump the cars? A. No.

Q. You don't have anything to do with the maintenance of any of the equipment that is used to dump the cars or get the, I'm sorry, I mean dump the coal and get the coal actually onto the ship itself? A. No.

Q. And of course you don't do any maintenance work on any of the equipment, do you? A. No. No.

Q. Now, with regard to the other facility which is the Pinney Dock company, is that correct? A. Yes.

[16] Q. Now, is that facility primarily concerned with iron ore? A. Yes.

Q. Again, do you have anything to do with the loading of the iron ore into the cars? A. No.

Q. Is that all done by employees at the Pinney Dock company? A. Yes.

Q. And do they have special equipment for that purpose? A. Yes.

Appendix C

Q. Do they get the ore from the ships and load it into the ore cars? A. Yes, and then they have piles of ore there stored that they sometimes do that, you know, if they have an order for a certain kind they have it laying there in the piles and they do that themselves. We don't do it.

Q. Then do you pick up the loaded cars and simply take them to a track where they can eventually be picked up by a road crew? A. Yes.

Q. And likewise, do you take empties down to the Pinney Dock so that they can be loaded for later [17] pickup? A. Yes.

Q. Is your work, does your work involve anything other than moving either loaded or empty cars from one point to another? A. That's all about it involves.

Q. Is all of the actual loading and unloading of either the coal or the ore then done by people employed by the dock companies? A. Yes.

Q. Either the coal dock company or the Pinney Dock company? A. Yes.

* * *

APPENDIX D — EXCERPTS FROM THE DEPOSITION OF CARL ENGLUND

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO - EASTERN DIVISION

JUDGE ALDRICH
CASE NO. 1:91 CV 1022

GEORGE R. STOWERS,

Plaintiff,

-vs-

CONSOLIDATED RAIL CORPORATION

Defendant.

Deposition of *CARL ENGLUND,* taken as if upon cross-examination before Linda A. Astuto, a Registered Professional Reporter and Notary Public within and for the State of Ohio, at the offices of Nurenberg, Plevin, Heller & McCarthy, 1st Floor Standard Building, Cleveland, Ohio, at 10:00 a.m. on Monday, December 9, 1991, pursuant to notice and/or stipulations of counsel, on behalf of the Plaintiff in this cause.

MEHLER & HAGESTROM
Court Reporters
1750 Midland Building
Cleveland, Ohio 44115
216-621-4984
FAX 521-0050
800-822-0650

* * *

Appendix D

[24] Q. Well, what you use them for is to take them to some facility where they can either be dumped for loading or loaded to be taken out — well, strike that.

I don't think you do take out loaded coal cars from the dock company, do you? A. No.

Q. So they're really transported from what I'll call the receiving facility, if that's okay with you? A. Uh-huh.

Q. You call it, do you call it a receiving track or do you call it a storage track? I will use whatever term you normally use. A. We refer to the area as the bridge yard.

Q. All right. Then they're dropped off from the road in the bridge yard and then a yard crew's job is to take them from the bridge yard and transport them from the bridge yard down to the coal dock where coal dock people can then dump them, is that basically it? A. That's correct.

[25] Q. But all of the dumping itself is done by coal dock people, isn't that so? A. That's correct.

Q. Your people's job is simply to spot the cars so that they can be then thereafter handled by coal dock people? A. Yes. We spot them and we pull them away when they're empty.

Q. Right. Have you ever worked in any kind of an industrial switching job of any sort like Chrysler, Ford, CEI or any industrial facility that is serviced by Conrail? A. Not recently, no.

Q. But you've done it? A. Yes.

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Q. Are you familiar with the kind of work that's done? A. Yes.

Q. And essentially what's done is that a Conrail crew takes loads and spots them where the industry wants them and then takes empties back out for basic reloading someplace, isn't that basically what an industrial job is? A. Yes, sir.

Q. And this job is essentially the same thing as [26] any other industrial switching job, isn't is? A. Which job, sir?

Q. The job you're doing for the coal dock company. All you're doing basically is spotting cars for unloading and pulling out empties? A. Yes. We are spotting loads and pulling empties, that's correct.

Q. A typical railroad switching yard in a yard facility, right? A. I wouldn't call Ashtabula Harbor typical, but yes, railroad switching, yes, sir.

Q. Now, do you have some communication with the supervisors of the dock company where they tell you what their needs are? A. Yes. The yard master and I both do. The yard master has a direct telephone to their office and the supervisors send messages either by fax or by picking up the phone.

Q. And what kind of information do they give you? A. It can be very specific or very general.

Depending on the type of boat that's there, they may want certain types of cars placed or he may just tell us that any low sulfur hydro you have can be put up. So we can be very generic or we can go by actual car number.

Appendix D

[27] Q. Are there some kind of mechanical facilities that the dock company uses for the unloading of the coal, something like a dumper of some sort? A. Yes, sir, there is.

Q. And is there more than one dumper? A. No. Just one.

Q. So each loaded coal car I guess has to go through the dumper, doesn't it? A. Yes.

Q. And who moves the cars then — strike that.

Is there a track adjacent to the dumper in some way so that the cars can be dumped? A. I don't follow you.

Q. Well, mechanically, I'm not familiar with it, I've never seen it, but the car obviously has to be spotted in some way in relation to the dumper in order to be dumped. A. Yes. The yard crew pushes it up into the dumper and they grab it with a set of retarders and hold it for a mechanical arm.

Q. Then all of that equipment is operated by coal dock people, correct? A. Yes, sir.

* * *